NO. 83-1320

In the

Supreme Court of the United States

October Term

WESLEY K. BELL Defendant Appellant

vs.

TOWNSHIP OF EAGLESWOOD Plaintiff Appellee

On Appeal from the Supreme Court of NEW JERSEY

MOTION TO DISMISS OR AFFIRM

George R. Gilmore, Esquire
Gilmore & Monahan, P.A.
Nine Allen Street
Post Office Box 1540
Toms River, New Jersey 08753
(201) 240-6000

Attorneys for Appellee

May 3, 1984

QUESTIONS PRESENTED

Appellee, Township of Eagleswood, disputes the statement of Questions Presented by Appellant, Wesley K. Bell. None of the questions set forth at Pages i and ii of appellant's brief are properly before the court.

Question 1a, Page i of appellant's brief, was not raised in the trial court, see Transcript at Appellant's Appendix, Page 6a through 75a, and Appellant's Trial Brief, at Appellant's Appendix, Page 131a. Neither were these issues raised before the Superior Court of New Jersey, Appellate Division, see Appellee's Appendix, at page 3a, and Opinion of the Superior Court of New Jersey, Appellate Division, at Appellant's Appendix, Page 121a. See also, Appellant's Petition for Certification to the New Jersey Supreme Court, at Appellee's Appendix, Page 27a.

Questions (c), (d), (e & f), or (g) were not raised before the Superior Court of New Jersey, Appellate Division, or the New Jersey Supreme Court, Appellee's Appendix, Page 3a, and Appellee's Appendix, Page 28a.

Only Question (b) of the statement of questions presented by Appellant has ever been presented to a New Jersey Appellate Court. This question, as presented to the New Jersey Appellate Division (hereafter appellate division) addressed the constitutionality of the Eagleswood Township zoning ordinance in light of the absence of a provision for political signs. As indicated at Appellee's Appendix at Page 21a, the Brief of Wesley K. Bell, before the Appellate Division, raised this issue at Point 3. Appellant argued before that court that the sign ordinance covering R-2 Zone was unconstitutional due to its lack of provision for political advertisement. This question was answered by the Superior Court of New Jersey, Appellate Division, in its affirmance of the trial courts' decision upholding the ordinance, see Appellant's Appendix at Page 121a. The Appellate Division,

in affirming the decision of the trial court, did address this constitutional argument. The New Jersey Court stated:

> "The Defendant also challenges Section 103-8H of the Zoning Ordinance as being unconstitutional as an impermissible infringement upon the First Amendment right of freedom of speech. We doubt the standing of Defendant Bell to raise this issue. Bell was allowed by the Municipality, and indeed it is reflected in the Judge's Order, to construct a temporary sign bearing a political message, as long as it did not exceed 32 square feet in total sign area. It appears that Bell had begun the construction of such a sign on the property. This limitation on square footage was imposed since that is the largest dimensioned sign that is allowable by the section in the Zoning Ordinance which permits signs. Size, limitations, absent an arbitrary determination, are allowable. *State v. Miller*, 83 N. J. 402, 416 (1980). The limitation here is reasonable." Appellant's Appendix, Page 127a, 128a.

Thus, the Superior Court, Appellate Division, determined that although the Eagleswood Township zoning ordinance contains no provision for political signs the ordinance was not unconstitutional. In the alternative, the Court determined that Defendant Bell had no standing to raise the issue since he had not alleged that he sought to erect a political sign larger than 32 square feet. Indeed, it appears from the transcript of the hearing before the trial court that Defendant Bell was contemplating erecting several political signs, each individually not exceeding a 32-square-foot limitation. Whether or not this was done does not appear of record, see Appellant's Appendix at Page 57a through 60a.

For the reasons which follow, it is respectfully submitted that this court should not address the constitutionality of the Eagleswood Ordinance.

TABLE OF CONTENTS

COUNTERSTATEMENT OF THE CASE

Appelle, Township of Eagleswood, most strenuously objects to the unsupported statements contained in the Statement of the Case furnished to this court by the appellant. Many of the same are absolutely unsupported by testimony or in affidavit, and none have been presented to any Appellate Court prior to the date they appeared in Mr. Bell's jurisdictional statement. They do not belong in the Statement of the Case presented to this court as they are not in any way relevant to the questions sought to be presented. This being the case, they will not be responded to by the municipality

This matter involves an interpretation of the zoning ordinance of the municipality of Eagleswood Township, located in Ocean County, New Jersey. From approximately 1960, Mr. Bell had maintained two billboard signs on a parcel of property in the township, see Appellee's Appendix at page 8a. In 1975, Mr. Bell purchased the property known as Lot 21, Block 29 on the Tax Map of the Township, Appellee's Appendix, Page 8a. In 1977, the Plaintiff conveyed this parcel to some third parties. He received from these purchasers the right to maintain two easements at the corner of the property where he believed the billboards were located.

Subsequent litigation between Mr. Bell and an adjacent property owner revealed that the billboard signs were not on the points where the easements had been retained. One of the billboard signs was located on an adjacent parcel, and one of the billboards was located on the approximate center of the parcel conveyed by Mr. Bell. The easements stood on the corners of the property conveyed by Mr. Bell some distance away from the signs, Appellee's Appendix, Page 30a. In 1975, the Township of Eagleswood adopted a zoning ordinance prohibiting billboard signs in the zone in which

this property was located. Under New Jersey law, the billboards of Mr. Bell constituted nonconforming uses and the municipality has conceded on numerous occasions that had they remained at their original locations, no action could have been taken to compel their removal, see Appellant's Appendix at Page 13a.

In 1981, Mr. Bell began to relocate the two signs and to erect a third sign which he alleged was to be a political sign. Subsequent to undertaking this action, he made application to the township zoning officer for permission to move the signs. His application was denied, Appellee's Appendix at Page 45a. In spite of this denial, Mr. Bell refused to remove his signs and continued to erect the third sign. No application whatsoever was made for the third sign, Appellee's Appendix at Page 45a. Additionally, although Bell had the obligation of appealing the determination of the zoning officer to the Eagleswood township zoning Board of Adjustment, he never took such an appeal but proceeded in the face of the denial, see Appellant's Appendix at Page 12a.

The Township of Eagleswood filed a complaint in the Chancery Division of the Superior Court of New Jersey, seeking injunctive relief by way of an order of that court compelling the removal of the signs as being in violation of the township zoning ordinance, Appellee's Appendix at Page 44a. On July 9, 1981, the matter came on for hearing before the Honorable Henry H. Wiley, J. S. C., Superior Court of New Jersey, Chancery Division, Ocean County, Appellant's Appendix at Page 6a. That hearing resulted in the order entered by Judge Wiley on July 22, 1981, Appellant's Appendix at Page 95a. The order directed Mr. Bell to remove the billboard signs within 20 days and permitted the Defendant to utilize the existing poles for temporary political advertisements not exceeding 32 square feet.

Appellant filed a Notice of Appeal to the Superior Court of New Jersey, Appellate Division. The New Jersey Appellate Court affirmed and entered the Order found at Appellant's Appendix, Page 121a. Mr. Bell's application to the New Jersey Supreme Court by way of petition for certification was denied, Appellant's Appendix at Page 129a.

Mr. Bell also sought from the Superior Court of New Jersey, Chancery Division, Superior Court of New Jersey, Appellate Division, and the New Jersey Supreme Court, stays of the judgement entered below. Both lower state courts denied the applications for stays of the judgement. The New Jersey Supreme Court has not yet acted on Mr. Bell's motion for stay pending the appeal to this Court. Mr. Bell argued before the Superior Court of New Jersey, Appellate Division, that the movement of the signs was so inconsequential, as to not warrant judicial or administrative interference. This argument was essentially based upon the interpretation of a statutory provision permitting municipalities within the State of New Jersey to limit or restrict uses of land which existed prior to the adoption of a zoning ordinance, and which were prohibited by newly-adopted zoning ordinances. Mr. Bell also argued that the Eagleswood Township zoning ordinance was unconstitutional in that it did not contain a provision for political signs. Mr. Bell also argued that the adoption of the nonconforming use section of the Eagleswood Township zoning ordinance was in excess of the authority granted to Eagleswood Township by State Statute. Only the first and third of these arguments were presented to the New Jersey Supreme Court. No claim was ever presented to an Appellate Court in this State that the actions taken against Mr. Bell were politically motivated, that the actions were the result of a personal dispute between Mr. Bell and the Mayor of Eagleswood Township, or that any improper actions on the part of any public officials

occurred with respect to this matter. The untrue, irrelevant, and improper statements contained in Mr. Bell's statement of the case should be ignored and disregarded by this Court.

On approximately August 12, 1983, Mr. Bell filed a Petition for Certification to the New Jersey Supreme Court, Appellee's Appendix at Page 27a. This petition presented to the highest court of New Jersey the alleged errors committed by the Appellate Division. It contained two points of legal argument and it is important to note that it did not contain arguments concerning the alleged unconstitutionality of the township zoning ordinance for failure to provide for political advertisement.

LEGAL ARGUMENT

POINT 1

THE FEDERAL QUESTION SOUGHT TO BE REVIEWED WAS NOT PROPERLY RAISED AND NOT EXPRESSLY PASSED UPON BY THE COURT BELOW.

As the Court will note from the petition for certification appearing at Appellee's Appendix, Page 27a, the constitutional question dealing with the lack of a provision for political advertisement in the Eagleswood Township Zoning Ordinance was not argued or briefed before the New Jersey Supreme Court. Although the New Jersey Court Rules provide that once certification is granted, the Petitioner's entire case shall be before the Court, only those issues presented in the petition for certification could be considered issues raised on appeal. Indeed, prior to the Amendment of the New Jersey Court Rules, only those matters specifically mentioned in the petition for certification would be considered, see *State v. LeFante*, 14 N. J. 584 (1954).

Since the Appellant elected not to pursue this issue to the New Jersey Supreme Court, it has not been presented to nor passed upon by the court of a last resort of this State. As such, this Court does not have jurisdiction over the matter, see *Street v. New York*, 394 U. S. 576, 89 S. Ct. 1359, 22 L. Ed. 2d. 572 (1969). See also, *Barlemeyer v. State of Iowa*, 85 U. S. 129, 18 Wall. 129, 21 L. Ed. 929 (1873).

This court has set forth the proposition many times that only questions passed upon by the highest State Court will be undertaken for review. As set forth in *Youakin v. Miller*, 425 U. S. 231, 96 S. Ct. 1399, 47 L. Ed. 2d. 701 (1976):

"It is only in exceptional cases coming here from the Federal Courts that questions not pressed or passed upon below are reviewed." 425 U. S. at 235, 96 S. Ct. at 1401, Citing *Duignan v. United States* 274 U. S. 195, 200, 47 S. Ct. 566, 568, 71 L. Ed. 996, 1000 (1927).

Since the New Jersey Supreme Court has not had an opportunity to pass upon the matter, this Court should dismiss the appeal for lack of jurisdiction. See also *City of East Lake v. Forest City Enterprises, Inc.* 426 U. S. 668, 96 S. Ct. 2358, 49 L. Ed. 2d. 132 (1976) at 426 U. S. 672 (Footnote 2) 96 S. Ct. 2361.

POINT II

AN ADEQUATE STATE GROUND EXISTED FOR THE DETERMINATION BELOW, AND THIS COURT SHOULD, THEREFORE, DECLINE TO ENTERTAIN THIS APPEAL.

The New Jersey Supreme Court denied Appellant Bell's petition for certification to the Superior Court of New Jersey, Appellate Division. The denial of the petition for certification constitutes a refusal to review the determination of the Appellate Division. Since Mr. Bell's constitutional argument with respect to the problem of political advertising was not raised in this petition for certification, it is unclear whether or not the New Jersey Supreme Court considered that aspect of the case when declining to undertake a review. Since only two grounds for appeal were contained in Mr. Bell's petition for certification, and since these were both state questions, there is an adequate state ground to support the determination of the New Jersey Supreme Court.

The highest New Jersey Court may well have considered that Petitioner was pressing only the two state grounds for appeal. Since the Federal ground was not contained in the petition for certification, the New Jersey Court may well have interpreted the failure to present this argument as a waiver. Thus, since the New Jersey Court was not presented with the sole constitutional argument, ambiguity exists as to whether or not it was decided. The burden is on the Appellant to demonstrate to this court the existence of a substantial Federal question, see *Department of Mental Hygiene of Cal. v. Kirchner*, 380 U. S. 194, 85 S. Ct. 871, 13 L. Ed. 2d. 753 (1965). Since the New Jersey Court may well have decided, procedurally, that it was not presented with a Federal question, it could dispose of that issue without reaching the merits. A disposition on a procedural basis may constitute an adequate state ground, see *Henry v. State of*

Mississippi 379 U. S. 443, 85 S. Ct. 564, 13L. Ed. 2d. 408, Rehearing Denied, 380 U. S. 926, 85 S. Ct. 876, 13 L. Ed. 2d. 813, on Remand, 174 So. 2d. 348, 253 Miss. 263, Motion Denied, 381 U. S. 908, 85 S. Ct. 1528, 14 L. Ed. 2d. 431. See also *Jackson v. State of New Jersey* 384 U. S. 719, 86 S. Ct. 1772, 16 L. Ed. 2d. 882, Rehearing Denied, 385 U. S. 890, 87 S. Ct. 12, 17 L. Ed. 2d. 121.

Since an adequate state ground existed for the determination of this matter by the New Jersey Supreme Court, this court should decline to entertain the appeal. The highest court of a state should be given an opportunity to review and to construe a statute, or as in this case, an ordinance, prior to a decision on its constitutionality, see *Michigan v. Tyler*, 436 U. S. 499, 98 S. Ct. 1942, 56 L. Ed. 2d. 486 (1978). Thus, where an issue exists as to the extent of the alleged constitutional infirmity, the infirmity may be cured by a state court interpretation and need not be passed upon by this court. It is respectfully submitted that no constitutional infirmity exists in the Ordinance as applied to this Defendant. It is further submitted that since no opportunity for review has been granted to the New Jersey Supreme Court, due to the failure of Appellant to present the issue to that court, it should not be passed upon now.

POINT III

THE QUESTION PRESENTED IS SO INSUBSTANTIAL AS TO NOT REQUIRE FURTHER ARGUMENT.

The sole question presented to this court, which in any way involves a constitutional issue, is so insubstantial that it does not justify the expenditure of this court's time. The Eagleswood Township Zoning Ordinance contains no provision for political advertisement, Appellant's Appendix at Page 1a through 5a. This ordinance, adopted by the governing body of the municipality, is certainly subject to interpretation by that body. Enforcement of it is left to the Township Committee by State Statute. Section 9 of the New Jersey Municipal Land Use Act provides, in pertinent part, as follows:

"The governing body of a municipality shall enforce this act and any ordinance or regulation made and adopted hereunder. To that end, the governing body may require the issuance of specified permits, certificates or authorizations as a condition precedent to (1) the erection, construction, alteration, repair, remodeling, conversion, removal or destruction of any building or structure, (2) the use or occupancy of any building, structure or land, and (3) the subdivision or resubdivision of any land; and shall establish an administrative officer and offices for the purpose of issuing such permits, certificates or authorizations; and may condition the issuance of such permits, certificates and authorizations upon the submission of such data, materials, plans, plats and information as is authorized hereunder and upon the express approval of the appropriate State, county or municipal agencies; and may establish reasonable fees to cover administrative costs for the issuance of such permits, certificates and

authorizations. In case any building or structure is erected, constructed, altered, repaired, converted, or maintained, or any building, structure or land is used in violation of this act or of any ordinance or other regulation made under authority conferred hereby, the proper local authorities of the municipality or an interested party, in addition to other remedies, may institute any appropriate action or proceedings to prevent such unlawful erection, construction, reconstruction, alteration, repair, conversion, maintenance or use, to restrain, correct or abate such violation, to prevent the occupancy of said building, structure or land, or to prevent any illegal act, conduct, business or use in or about such premises." N. J. S. A. 40:55D-18.

The governing body therefore had the authority to enforce the provisions of its ordinance. Eagleswood Township stated at trial, on the record, that it would not take action against the construction of a political sign not exceeding 32 square feet, Appellant's Appendix at Pages 20a, 21a. The order of the trial court specifically permitted the construction of a 32-square-foot political sign, Appellant's Appendix at Page 96a.

In light of this interpretation, it is difficult to see how Mr. Bell has standing to raise the issue. Assuming arguendo that he does, the 32-foot limitation here is reasonable.

In *Baldwin v. Redwood City*, 540 F. 2d. 1360 (9th Cir. 1976), *cert.* den., *sub nom, Leipzig v. Baldwin*, 431 U. S. 913, 97 S. Ct. 2173, 53 L. Ed. 2d. 223 (1977), a 16-square-foot limitation was found proper. In *Ross v. Goshi* 351 F. Supp. 949 (D. Haw. 1972) an 18-foot size limitation was found to withstand constitutional attack. Thus political speech may be regulated as to time, place and manner. Given the determinations of the *Baldwin* and *Ross* courts, and the relative limitations considered by those courts when

compared to the 32-square-foot limit here, the question presented is insubstantial and the determinations below should be summarily affirmed.

CONCLUSION

For the reasons set forth herein it is respectfully submitted that the Appellant's appeal should be dismissed or in the alternative, summarily affirmed.

Respectfully submitted,

GEORGE R. GILMORE, ESQUIRE
GILMORE & MONAHAN, P.A.
NINE ALLEN STRET
POST OFFICE BOX 1540
TOMS RIVER, NEW JERSEY 08753
(201) 240-6000

Attorneys for Appellee

APPENDICES

Appellee, Township of Eagleswood, has attempted to faithfully reproduce the items contained in this appendix. No attempt has been made to correct misspellings, typographical or citation errors committed by appellant or his counsel in the Appellate brief or Petition for Certification contained herein.

In addition, no adjustment of the appellant's tables of contents or citations in the aforementioned documents has been made to reflect new page numbers.

The items omitted from the appendix to Appellant's Appellate brief are either set forth in his Jurisdictional statement, or referred to therein. Appropriate references have been provided.

Superior Court of New Jersey

APPELLATE DIVISION
DOCKET NO. C-4054-80
APPEAL NO. A-00428-81-TO2

	CIVIL ACTION On Appeal from
Township of Eagleswood plaintiff-respondent,	Superior Court of New Jersey Ocean County-Chancery Division
v.	
Wesley K. Bell, defendant-appellant	SAT BELOW The Honorable Henry H. Wiley, J.S.C.

BRIEF AND APPENDIX
for
DEFENDANT-APPELLANT, WESLEY K. BELL

LAWRENCE SILVER, ESQ.
Attorney(s) for Defendant-appellant
P.O. Box 549
Barnegat, New Jersey 08005
(698-2050)

TABLE OF CONTENTS

TABLE OF CASES & STATUTES

REFERENCES TO TRANSCRIPT

T-1, July 9, 1981

T-2, JULY 22, 1981

PROCEDURAL HISTORY

On May 21, 1981, plaintiff filed a Verified Complaint, upon which the Court issued an Order to Show Cause to compel the defendant to remove three (3) billboard signs which were contended to be relocated by defendant on his lot and block, in violation of the Eagleswood Township Zoning Code which prohibited such signs in that particular zone, being R-2. On the return date of the Order to Show Cause, July 9th, 1981, defendant appeared pro se. No Affidavits or answering papers were filed at that time. The Court issued an Order dated July 22, 1981, compelling the defendant to remove his two (2) signs from the premises within twenty (20) days. The Court further found that the sign which would be a temporary political sign, would be allowed if not in excess of 32 square feet in overall dimension.

On September 24th, 1981, the Superior Court entered an Order finding that defendant had violated the previous order of July 22nd, 1981, by failing to remove the two (2) signs detailed in the previous order and imposed a fine in the amount of $50.00 per day from September 21, 1981 until said signs were removed.

Simultaneously with the application for the order referred to of September 22, 1981, defendant moved for a stay of the order compelling the removal of the signs, until the disposition of an appeal which was about to be taken to the Appellate Division of the Superior Court of New Jersey. The Order of September 24th, 1981 denied a stay of the enforcement of the previous order of July 22, 1981. On September 17th, 1981 a notice of motion to file an appeal out of time was filed in the Appellate Division of the Superior Court, by the defendant. The appeal is presently pending.

On September 29th, 1981 defendant made an application to the Superior Court, Appellate Division for a temporary

stay of the inforcement of the order of the Court to remove his signs and for the running of the penalty issued by the Honorable Henry H. Wiley. Said application was denied by order dated October 1, 1981.

Defendant appealed to the Supreme Court of New Jersey for a stay of the orders entered by the Honorable Henry H. Wiley. The Supreme Court of New Jersey refused to grant the stay.

In March of 1982, appellant filed a Motion for Remand to the Superior Court of New Jersey, Chancery Division, which was denied. In February of 1982, appellant filed a complaint in lieu of Prerogative Writ, Superior Court of New Jersey, Law Division, seeking to have the zoning ordinances of the Township of Eagleswood declared unconstitutional.

The purpose of the motion for remand was to permit the Superior Court of New Jersey, Chancery Division, to make complete findings to obviate the need for this appeal.

STATEMENT OF FACTS

On October 7th, 1960, plaintiff executed an advertising lease with the estate of George E.Johnson. (D-A 15). Said lease permitted the construction of out-door advertising signs on the property of the estate, located in the Township of Eagleswood, County of Ocean, State of New Jersey. Pursuant to that lease, two (2) signs were constructed on the premises, later known as lot 21 block 29 as shown on the Tax Map of the Township of Eagleswood, and there is no dispute that on the Township records anyway, said advertising signs were located on that lot. The lease was renewed on April 10th, 1963. (D-A 16). On February 14th, 1975, plaintiff purchased by deed the lands and premises known as lot 21 in block 29, described above. (D-A 17). On May 31st, 1977 plaintiff conveyed the lands and premises to Richard J. Shackleton and Catherine R. Shackleton, his wife (D-A 18), and simultaneously received two (2) easements at each corner of the premises where the two (2) billboard signs were presumed to exist. (D-A 22). In December of 1979, suit was brought against the plaintiff in the Chancery Division, Superior Court, under docket number C 3654-78, claiming that one of the billboard signs was located on the property owned by another. Judgment was entered against the plaintiff to have him remove his signs onto his premises. The lands upon which the one sign was erroneously located, abut defendant's property to the south.

In February of 1975, the Township of Eagleswood enacted a zoning ordinance. The zone in which the billboard signs were located was designated as R-2. Advertising billboard signs were no longer a permitted use, nor a permitted structure. Up to that time, there being no zoning ordinance, the billboard signs were a permitted use. (D-A1).

In the spring of 1981, plaintiff began to move the one sign onto his premises, together with moving a second sign from one part of his premises to another and began to erect a third sign which was a political sign. On April 1, 1981 an application was made to relocate the signs on the premises. On April 3, 1981, said application was denied pursuant to Eagleswood Township Zoning Code, Chapter 103, Section 39, NON CONFORMING USES OF LAND: "No such nonconforming use of land shall be moved in whole or in part to any other portion of a lot or parcel." (D-A 9).

In spite of the denial, the defendant began to erect the sign. The complaint was filed to compel the defendant to remove the sign as he had no permit for the placement of same. The third sign which was the subject of the action below, no permit was applied for. It was merely a sign to announce the candidacy of defendant Bell.

While there is no provision in the zoning code, under prohibited signs, or signs of a political or public interest nature, Judge Wiley held:

> "THE COURT: While I don't think that I have to answer that, Mr. Bell. Actually, there is no sign...political sign that you actually attempted to install, but the municipality has said they will permit you to install a political sign on a temporary basis in a residential zone as long as it is less than 32 square feet. And that's my ruling. I will allow you to do it. I will not prohibit them or restrict them from prohibiting you from doing it."
> July 9th, 1981, p. 36, L. 11-25.

From 1960 through the spring of 1981, defendant had on a continuous basis, with respect to said billboards, advertising of a business nature, political and public interest messages. It is conceded that the billboard structures as they exist, are larger than as permitted by the Zoning Code of Eagleswood Township.

POINT I:

PORTIONS OF SECTION 103-39. NONCONFORMING USES OF LAND., ARE INVALID AS THEY EXCEED THE AUTHORITY GRANTED BY STATUTE, N.J.S.A. 40:55D-68.

The zoning power of a Township was discussed in *Taxpayers Association v. Weymouth Township, 80 N.J. 6, (1976).* At page 20, the Court discussed the power to zone:

> "Zoning is inherently an exercise of the States Police Power. Consequently, municipalities have no power to zone except as delegated to them by the legislature. In this regard, zoning powers are granted to municipalities by the Zoning Enabling Act, N.J.S.A. 40:55-30 et seq., (now 40:55D-62, 40:55D-65, 40:55 D-67)", (case citiations omitted).

Municipalities have no inherent authority to enact zoning ordinances except as derived from State by Statute. *Kursh Holding Co. v. Manasquan, 111 N.J. Super., 359, (App. Div., 1970), Rev. 59 N.J. 241, (on other grounds).* Likewise, a municipality must look to legislation to determine the scope of their zoning powers. *Burger v. State, 71 N.J. 206, (1976).*

It is not contended in this memorandum that the defendant Township, in its zoning ordinance, arbitrarily and capriciously created an R2 Zone at the location of the billboards. It is further accepted that the Township has the right to regulate non-conforming uses and structures. Non-conforming uses and structures are defined in *N.J.S.A. 40:55D, 5,* as follows:

> "*Non-conforming Structure,* means a structure the size, dimension, or location of which was lawful prior to the adoption, revision or amendment of the Zoning Ordinance, but which failed to conform to the requirements

of the Zoning District in which it is located by reason of such adoption, revision or amendment."

"*Non-conforming Use*, means a use of activity which was lawful prior to the adoption, revision or amendment of a zoning ordinance, but which failed to conform to the requirements of the zoning district in which it was located by reason of such adoption, revision or amendment."

This is not a case where the new location of the billboards conflict with the set-back, side-yard or other lot locations of the zoning ordinance, but rather solely that the structure, billboards and the use of out door advertising are prohibited in the zone. *N.J.S.A. 40:55D-68*, deals with non-conforming structures and uses:

"Any nonconforming use or structure existing at the time of a passage of an ordinance may be continued upon the lot or in the structure so occupied and any such structure may be restored or repaired in the event of partial destruction thereof." (See predecessor statute N.J.S.A. 40:55-48).

In some jurisdictions, the authorities have deemed it necessary to take legislative steps towards compelling the early abandonment of nonconforming uses and structures. *Grant v. Mayer of Baltimore, 212 Md., 301, (Ct. App., 1957)*. However, in New Jersey there has been no legislative steps and our Courts have continued with the application of the doctrine that nonconforming uses may not be enlarged as of right, except when the enlargement is so negligible or insubstantial that it does not fairly warrant judicial or administrative notice or interference.

Municipalities have forever attempted to circumvent the statutory language relative to nonconforming structures and uses and have repeatedly been unsuccessful.

In *State v. Accera, 36 N.J. Super., 421, (App. Div. 1955)*.

The Borough of Eatontown dealt by ordinances with nonconforming uses as follows:

> "No building or premises which cease to be actively engaged in a nonconforming use for a period of one (1) year, shall be allowed to resume such nonconforming use, but must be altered to conform with the restrictions of the zone in which it is."

At page 423, the Court discussed this ordinance in conjunction with the predecessor nonconforming use statute, RS 40:55-48. (Same as present statute). At 423, the Court held:

> "This statute was enacted obviously with a view to certain conflicting interests. On the one hand, there are municipalities strong interest in a planned community sofaras it may be secured through the média of zoning. Nonconforming uses weaken the plan, and besides, in some cases, confer upon their users vested monoplies in their respective zones. On the other hand, there are the interest of the owner and his nonconforming use and in society in preventing an economical waste; and beyond that, there is societies concern for those who contemplate entering business or making improvements and who seek security against future changes in the zoning plan.
>
> Confronted with these diverse interests, the legislature authorized a continuance, indefinitely of any nonconforming use existing at the passage of an ordinance. A municipal ordinance, of course, cannot interfere with the statutory purposes. As said in *United Advertising Corp. v. Borough of Raritan, 11 N.J. 144, 152, 153, (1952);* 'It is beyond the power of a municipality to limit by zoning ordinance the right expressly given the owners (of a nonconforming use) by this statute indefinitely to continue a nonconforming use.' Our inquiry comes down to this; does the statute protect a nonconforming use under some circumstances even

though there has been a censation in the user for a year?"

The Appellate Court found in the case before it, that under some circumstances a nonconforming use may be continued even though it was not exercised for a substantial period of time. At page 425, the Court found that that being the case any attempt by a municipality to foreclose all nonconforming uses under all circumstances of such a break, violates the statute. In *Spiegel v. Borough of Beach Haven, 16 N.J. Super., 148 (App. Div., 1971),* the Borough had an zoning ordinance establishing a percentage of damage beyond which a nonconforming construction may not be replaced or reconstructed. The Court held as follows:

"What constitutes 'partial destruction' must depend upon the facts of each case...we go no further...then to hold that a percentage of delineation by ordinance is not authorized."

It is cited *H. Behlon and Bros. v. Mayor of Kearny, 31 N.J. Super. 30, (App. Div., 1954).* In Behlon, supra., the Town had ordinances permitting restoration where there were percentages built into the ordinance. The ordinance also dealt with what rights of repair a nonconforming user may have to its structure. Accordingly, the ordinance had a dual pronged approach. Structures could only be restored if it had a certain percentage of the structure remaining and could only be repaired if the repairs involved less than a stated percent of the value of the building.

The Court held that the statutes specific treatment of nonconforming uses would prevail over any right or authority which may other wise thought to exist by virtue of the reference to reconstruction, alteration, or repairs in the general provisions of *RS 40:55-31.* It further went onto say:

"With respect to the authorization for reconstruction or structural alterations where there has been no

> destruction, we do not believe that the legislature intended by the quoted statutory provisions to preclude reconstruction or alteration which prudent mangement or safety may require in the ordinary course of events, so long as the nonconforming use itself is not altered or enlarged. ...any other view would be tantamount to a finding that the legislature intended that, except or ordinary repairs, a nonconforming structure must be permitted to become antiquated or to disintegrate in a state of collapse."

Accordingly, the ordinance was invalidated.

The case law has then consistently held that the statute dealing with nonconforming uses and structures provides for their continued use, and that they may not be enlarged or expanded except where the change is so negligible or insubstantial that it does not warrant judicial or administrative interference. *Grundlehner v. Dangler, 29 N.J. 256, (1959); Belleville v. Parrillo's Inc., 83 N.J., 309 (1980).* The Court cited numerous cases at page 315-317, standing for the proposition that N.J.S.A. 40:55 D-68, is to be construed by a case basis as to whether or not a nonconforming use has been extended or altered to such an extent as to lose the use.

Turning now to the nonconforming use section of Eagleswood Township zoning code, it is apparent that certain sections dealing with use and structure, which are more properly criteria to decide on a case by case basis (whether a use or structure which is nonconforming has been altered or extended) legislates such nonconforming use and structure out of existence.

103-39 Nonconforming Uses:

There are three parts dealing with nonconforming uses. Turning first to section C. If the nonconforming use has ceased for any reason, for a period of one year or more, then the use is lost. This part is clearly in conflict with *Accera,*

Supra. Section A states that not only may a nonconforming use not be enlarged or increased, but further cannot extend to occupy a greater area of land that was occupied by such use at the effective date of the adoption of this chapter.

Section B states that use shall not be moved in whole or in part to any other portion of the lot or parcel occupied by such use at the effective date of the adoption of this chapter. The question to be asked is *whether or not there can be an inconsequential or unsubstantial movement or extension which does not warrant administrative interference*, such as legislated in the ordinance. The case law cited holds that in certain situations there can be. However, under the ordinance, any movement or extension is violative of the nonconforming use.

Accordingly, parts A, B, and C must fall in that it is more properly for the legislature and the legislature by its inaction, has, in accordance with *Parrillo, Supra.*, left the matters to be treated on a case by case basis.

Section 103-41 which treats nonconforming uses of structures, in combination, consists of seven (7) parts. Without listing each part individually, (Ordinance attached hereto as D-A 12), it is clear that this section must also fall.

At T.1, p.32 * the Court began a discussion of its finding of fact in the matter. T.1, P.32.L.8-T.1, P36, L10. At T.1, P.33, L11, the Court discussed specifically the attempted relocation by Mr. Bell of his signs. It stated as follows:

"The zoning provision Article Six refers to nonconforming use and Section 103.39 B reads and I'll quote: 'No such nonconforming use shall be moved in whole or in part to any other portion of the lot or parcel occupied by such use at the effective date of the adoption of this chapter.'

And here there was an attempt to relocate the sign

T.1. p. indicates transcript July 9th, 1981

without first getting the municipal approval. And I find that that is in violation of the municipal ordinance, and therefore, I will order that the two signs which are presently relocated and which have commercial information on them,. one is an advertisement, Holly Lake Park, that's how I'll identify that sign. That should be removed. And the other one has the information on it, Tradewinds Furniture; but again, that's a commercial sign. It's been relocated and it's in a residential zone without obtaining first the permission of the proper municipal officers."

At T.1, P.26, L.13, Mr. Bell raised the issue that the nonconforming use has not undergone a substantial change or enlargement and should be entitled to continue even though relocated onto the premises. It was not contended by the plaintiff, that the signs were of a different character or size as those which were continuously on the premises, nor that said signs would take up more area than they previously did. However, in his findings of fact and conclusions of law, the Court did not address itself to that issue. It merely stated the literal language of the ordinance and found that any movement of the signs without prior approval would be in violation of same.

Accordingly, based on the survey presented herein of the various sections of the Eagleswood Township Ordinance as it relates to nonconforming uses and structures, defendant requests that said ordinance is to be declared invalid.

POINT II.

IT IS CLEAR THAT PLAINTIFF'S DESIRE TO PLACE HIS SIGNS IN CONFORMANCE WITH HIS EASEMENT IS SO INSUBSTANTIAL AND INCONSEQUENTIAL AS NOT TO WARRANT ADMINISTRATIVE INTERFERENCE AND THAT THE SAME IS AUTHORIZED BY N.J.S.A. 40:55D-68.

The areas in which plaintiff's signs have existed since 1960 has not changed in its character. It is comprised mostly of woodlands and bounded by commercial buildings in the nearby area. There is no residential housing in the area, nor has there been any for at least twenty (20) years. The replacement of plaintiff's billboards shall be the same size, composition and square area. It is interesting to note the case law cited by *Parrillo, Supra.*, which sets forth the standards for whether a substantial change in use has occurred. At page 314, the Supreme Court held:

> "The focus in cases such as this must be on the quality, character, and intensity of the use, viewed in their totality and with regard to their overall effect on the neighborhood and zoning plan."

While the zoning plan may be R-2, the neighborhod as it exists will be little affected by the movement of the signs. It is clear in this matter, however, that the use has not changed nor has it been enlarged. Additionally, the property which is the subject of this action, borders the commercial zone. It is only the position of the structure which has changed. In *Kramer v. Town of Montclair, 33 N.J. Super., 16 (App. Div. 1954).* Kramer had a nonconforming right to use his premises for the parking of one and half ton trucks. Under said right as many as sixty (60) trucks had been parked on the premises, each truck being one & ½ tons, 22 feet in

length and 7½ feet in height. At the time of the litigation, he had only 15 trucks or fewer on the premises, but each were 6 tons, 40 feet in length and 9 feet high. The Court held that irrespective of the change in the type of trucks, there was no increase in either total tonage nor in the total length of the trucks stored, or so far as it appeared, in the total area devoted to parking. The Court held that what affect if any said increase would be, it did not have to say. At page 17, the Court held;

"So far as we observed, we see no factor by which to measure any enlargement except that some of the trucks are bigger. But we do not think that this extends the use under the circumstances."

The Court also dealt with whether or not there was a change in the kind of use.

"So far as we can ascertain, the change is insignificant."

It is further fundamental, that there being no change in the size, composition, the square area of the billboard is significant import to support his position, in light of *Kramer, Supra.*

While the New Jersey Courts have not dealt specifically with the issue concerning billboards and their placement and their relocation as affecting a nonconforming use, other Courts have. The Pennsylvania Courts have been faced with similar issues. In *Rothrock v. Zoning Board of Whitehall Township, 319 A 2nd, 432, (Co. Ct., 1974),* an automobile business was operating in an R-2 zone as a nonconforming use. Additionally, it had a sign announcing the business which was also nonconforming. Rothrock placed a new sign similar to its old one on the premises. The only differences were:

A. The new sign had the words, "Datson, Used Cars."

B. The new sign had a new concrete base at a different location. (the location difference was minute).

C. The new sign had two steel poles where the other sign had but one.

Under the ordinance, nonconforming signs could continue and be maintained for a period of seven (7) years. Apparently, the Pennsylvania legislature permits the zoning out of existence of nonconforming uses, a treatment which New Jersey finds repugnant. (See *United Advertising Co. v. Raritan, 11 N.J. 144, (1952).* In spite of same, the Court found that the differences between the old and new signs were de minimis, and held that the same were not an enlargement or extension of a nonconforming use or structure.

It cited for support of its opinion, *Alden Park Corp. v. Philadelphia Zoning Board of Adjustment, Inc., 84 Pa. D & C 40, (1952).* In Alden, a building permit for a new sign to replace the old one was denied because the location was changed by nine (9) feet and the new sign was stainless steel, whereas the old one had been made of wood. The Court held as follows:

> "1. The nonconforming right to maintain a sign is not limited to the exact kinds, style and location of the old sign.
>
> 2. That the changes in the new sign were de minimis and would not justify a refusal to approve a new sign."

Defendant's right to a nonconforming use was somewhat clouded by the Court at T.2 * P.2 beginning at L.2 through L.18. In response to defendant's question as to whether or not the billboards have lost their nonconforming use as a result of their relocation, the Court, at L.10 advised:

> "I don't think it is an issue before or wasn't before me, whether the boards...the billboards in their new location have lost their nonconforming use or they have not...wasn't an issue. The issue was whether you could

*T.2 to indicate transcript July 22, 1981.

relocate them pursuant to the ordinance. So I am not going to make that finding, because it's not...wasn't part of the case."

At T.2, P.3, L.13, the Court stated, in rebuttal to Mr. Bell's assertion that it need decide whether the relocation of the signs were in accordance with his nonconforming use, as follows:

"The Court. Well I disagree. My finding was that the ordinance did not allow you to do what you did here. So I am not making anymore of a finding then that."

It is clear that a building permit was necessary for the relocation of the sign, albeit they were moved within the lot. However, the issue was raised and it was incumbent upon the Court to decide whether or not the ordinance prohibiting the movement of the signs was in conformance with the Municipal Land Use Act, and further, whether or not the movement of the signs was of such a nature as to not render administrative interference. This the Court failed to do.

POINT III

THE SIGN ORDINANCE IN THE R-2 ZONE IS UNCONSTITUTIONAL.

The R-2 zone, permits signs as follows:

H. Permitted Signs:

"(1) Signs advertising the sale, rent or lease of the land or buildings upon which such signs are located. Such signs shall not exceed eight (8) square feet in area, shall be distant from the street line not less than one-half (½) of the front yard depth and shall not be illuminated.

(2) Signs or bulletin boards not exceeding twenty (20) square feet in area, identifying a public building, project, school or similar use. Such as the name of the building or institution and its activity of service. They may be illuminated, but not flashing.

(3) A sign or nameplate, nonilluminated, identifying the owner or occupant of the building or dwelling unit, provided that the surface area does not exceed six (6) square feet on any one (1) side.

(4) signs of a temporary nature that identify an engineering or architectural contractor engaged in the construction of a building, provided that the surface of such signs shall not exceed or total more than thirty-two (32) square feet in area and provided that such signs are removed prior to occupancy of the building."

The Commercial zones carry the following section with respect to permitted signs.

G. Permitted Signs.

"(1) A business or advertising free-standing sign not in excess of thirty-two (32) square feet in surface area per side.

(2) A shopping center shall be permitted two (2) free-

standing business signs each not over thirty-two (32) square feet in the surface area per side. No part of either sign shall be closer than ten (10) feet from a street right-of-way line or ten (10) feet from a side lot line. When only one such identification sign is erected, the total surface area may be increased by fifty percent (50%).

(3) Signs for automobile service stations may provided one (1) free-standing double-faced sign not to exceed thirty-two (32) square feet in surface area per side in addition to one (1) wall sign. Said signs shall not exceed twelve (12) inches in thickness and may advertise only the trade name of the product offered for sale."

The ordinance, while making provisions for commercial billboard signs, fails in all respects to make provision for signs of a political nature or of a public interest nature. In fact, as the sign ordinances are negative covenants, types of signs which are not provided for are in fact prohibited.

It is not contested that the Township has the right to regulate signs within its borders. However, to withstand strict constitutional scrutiny required, the restriction on signs must be tied to a compelling municipal interest as well as to the uses permitted in a given zone, *Shoen v. Hillside, 155 N.J. Super., 290 App. Div. (1975).*

In *Taxpayers Association v. Weymouth Twl., 80 N.J. 6, (1976), appeal dismissed and Cert. Den., Sub. No., Feldmanv. Weymouth, 430 U.S. 977, (1977),* the Supreme Court of New Jersey upheld zoning of a mobile home park exclusively for the elderly.In its opinion, the Court held as follows:

"Ordinance adopted under the zoning enabling act must bear a real and substantial relationship to the regulation of land within the municipality."

In *State v. Miller, 83 N.J. 402, (1980),* Miller had posted a

sign on his property warning prospective purchasers of the hazards of living in the area. The sign was not permitted in a residential zone, nor had it met the ordinance with respect to to the size of the signs. At page 416, the Court held;

> "It should be emphasized, however, that the regulation of sign content must be limited to a general distinction between commercial speech as tied to commercial use permitted in a given zone, and political speech which is and must be permitted everywhere. Specific types of messages or particular messages may not be prohibited... however they may of course be subjected to reasonable restrictions on their time, place and manner."

At page 414, the Court found that ordinances which prohibit against political or public interest speech via signs in a particular district, are unconstitutional on its face. It held:

> "Because the ordinance so directly cuts to the heart of the first Amendment, we decline to perform judicial surgery or to adopt a narrow construction in an effort to save it. The ordinance is unconstitutional on its face."

Plaintiff's billboards, as depicted herein, are not only for the purpose of commercial speech, but have from time to time been utilized to back candidates as well as bring messages of a public interest, other than commercial ones.

In *Metromedia, Inc., et al v. City of San Diego, et al, US (1981),* a billboard company was contesting the constitutionality of the San Diego ordinances prohibiting off-site advertising. Embodied in the ordinance, were stated exceptions to the prohibition on sign advertising. In fact, while the exceptions allow for certain commercial advertising, they do not allow for noncommercial, vis-a-vis political or public interest speech at that same location. Because of the prohibition on one commercial and public interest speech, as opposed to commercial speech, the Court held that the ordinance reached too far into the realm of protected speech

and was unconstitutional on its face.

Such is the matter before this Court. It is clear that the billboard advertising may be regulated within a residential zone, even prohibited. However, provisions have been made for billboard advertising in commercial zones. No such provision has been made in any zone for political or public interest messages.

The fact that the Township abandoned its claim that Mr. Bell did not have the right to construct a political sign in an R-2 zone is of no moment. (T.1, P.30, L.4-16). Within the confines of the ordinance itself, only certain signs are permissible.

To permit the Township, on a case by case basis to decide whether or not to enforce the ordinance as to public message or political signs, would create the confusion that *State v. Miller, Supra.* is sought to alleviate. At T.2, P.4, L.14, in discussing its findings and conclusions of law with respect to whether or not the ordinance itself permitted political billboards up to 32 square feet, the Court held:

"Thirdly, the Order has no findings that the ordinance permits political billboards up to 32 square feet as the Judge stated from the bench, even though the political billboard under construction is 96 square feet. Well I didn't make a finding on that, but the attorney for the Township stated, and I assume he would be bound by his statement, that they, that is the Township, would allow political signs up to 32 square feet. That was what he said. So that's in the record, and you can get the transcript of the record for that information on appeal if you think you need it. But I didn't make any finding like that. And I agree with that and I don't intend to--and the--" (T.2, P.4, L.14-T.2,P.5, L.3).

CONCLUSION

Nonconforming uses and the right to erect political and public message signs are protected by the *Municipal Land Use Act* and the *First Amendment* of the United States Constitution and the *Fourteenth Amendment* as it applies to New Jersey. The Township may not by ordinance supersede the authority granted to it under the Municipal Lane Use Act. The ordiances with respect to the nonconforming uses and structures go beyond the authority granted by statute.

It is equally clear from an analysis of the case law that certain speech of a non-commercial nature is to be protected, irrespective of whether or not the municipality agrees with the type of speech. (the candidacy of Mr. Bell).

It is respectfully requested that the ordinances as they relate to the type of signs permitted in a district, be declared unconstitutional. It is further respectfully requested that the ordinances as they relate to nonconforming uses be declared invalid as they supersede the authority granted by statute. In the event that said ordinances are held by the Court to be within the purview of the municipality by the authority granted by said statute, then it is respectfully requested that the Court find that the relocation of the two (2) billboard signs be found to be neither an enlargement nor an extension of a nonconforming use, but rather so insubstantial as to not warrant administrative interference.

LAWRENCE SILVER
LAW OFFICES
850 WEST BAY AVENUE
P. O. BOX 549
BARNEGAT, NEW JERSEY 08005
(609) 698-2050
(609) 698-2117

ITEMS OMITTED FROM APPENDIX OF APPELLANT BELL'S BRIEF IN SUPERIOR COURT OF NEW JERSEY APPELLATE DIVISION

ITEM	REFERENCE-APPELLANT APPENDIX
1. Eagleswood Township Zoning Ordinance	Pages 1a-5a
2. Transcript of Order to Show Cause	Pages 6a-75a
3. Transcript of Hearing on Form of Order	Pages 76a-88a
4. Deeds/Leases	Page 152a

SUPREME COURT OF NEW JERSEY

NO. A 428-81T2

Term: 1983

TOWNSHIP OF EAGLESWOOD,

Plaintiff respondent

CIVIL ACTION PETITION FOR CERTIFICATION TO THE SUPERIOR COURT, APPELLATE DIVISION

WESLEY K. BELL,

Defendant-petitioner

Sat Below:

Honorable Robert A. Matthews

Honorable Melvin P. Antell

Honorable George B. Francis

LAWRENCE SILVER, ESQ.
Attorney for defendant petitioner
P.O. Box 549
Barnegat, NJ 08005
698-2050

TABLE OF CONTENTS

TABLE OF CASES & STATUTES

SUPREME COURT OF NEW JERSEY

No. A 428-81T2

Term 1983

Township of Eagleswood,

Plaintiff-respondent,

CIVIL ACTION PETITION
PETITION FOR
CERTIFICATION TO THE
SUPERIOR COURT,
APPELLATE DIVISION

WESLEY K. BELL,
Defendant-petitioner

Sat Below:
Honorable Robert A. Matthews
Honrable Melvin P. Antell
Honorable George B. Francis

To the Honrable Chief Justice and Associate Justices of the Supreme Court of New Jersey,

Defendant-petitioner, Wesley K. Bell of Manahawkin, New Jersey respectfully shows:

STATEMENT OF THE MATTER INVOLVED.

Defendant is in the business of erecting and leasing outdoor advertising space. In 1960 the defendant erected two (2) signs on premises in Eagleswood Township, under lease from the owner. He subsequently pourchased the land from the owner and conveyed it to a third party, reserving for himself two (2) easements for which to carry the signs, in 1978. In 1975 plaintiff enacted a Zoning Code for the first time. Commercial Billboard Signs were not permitted in the zone in which the defendant was located. Approximately one (1) year thereafter, as a result of a Court challenge by an abutting land owner, defendant learned that his signs were not on the easements as provided, but rather one was on the abutting land owners property and another was approximately 50 feet off the easement. Defendant attempted to secure bulding permits from the Township to reconstruct his signs on the easements as so constituted. There is no questions that Eagleswood Township, at all times prior considered the signs as being on the lot in question. The Courts below held that the defendant was not entitled to move his signs to their proper location on the lot as a matter of right. The signs were of exactly the same quality, character, size and composition as the signs were in the previous location.

The Appellate Court, in affirming the decision of the Court below, relied upon *Belleville v. Parrillo's, Inc., 83 N.J. 309 (1980).* However, the Court erred in its analysis of this Court's holding in *Parrillo.* It concluded that movement of signs over 50 feet was not a negligible or insubstantial change as to permit their contuance on the premises. However, the Court only considered the re-location and not the "quality, character, and intensity of the use viewed in their totality and with regard to the overall affect on the

neighborhood and zoning plan." This was the standard of factors to be considered as set forth by the Court at page 314 in *Parrillo*.

The compelling reasons for the Court to grant certification in this matter is that failure to do so would serve to strip Mr. Bell of a valuable property right. His right to utilize the billboard signs in commercial activity would be destroyed on this location.

The Appellate Court further declined to consider in its opinion the ordinances of Eagleswood Township as they relate to nonconforming uses and structuraes as being overly broad and exceeding the authority as granted by *40:55D-68*.

The Lower Court fined Bell $50.00 per day for his failure to remove the signs. There is presently due approximately $2,800.00 in fines, interest and costs. It is respectfully requested that a stay of said fines be granted until this matter is decided.

ARGUMENT

POINT I.

DEFENDANT'S DESIRE TO PLACE HIS SIGNS IN CONFORMANCE WITH HIS EASEMENT IS SO INSUBSTANTIAL & INCONSEQUENTIAL AS NOT TO WARRANT ADMINISTRATIVE INTERFERENCE AND THE SAME IS AUTHORIZED BY N.J.S.A. 40:55D-68.

The standard by whether a substantial change in use has occured has been set by the Supreme Court in *Belleville v. Parrillo, Supra.* The standard is dictated on Page 314 as follows:

> "The focus in such cases, such as this, must be on the quality, character, and intensity of the use, viewed in their totality and with regard to their overall affect on the neighborhood and zoning plan."

The area in which the defendant's signs have existed since 1960 has not changed in its character. It is comprised mostly of woodlands and bounded by commercial buildings in the near by area. There is no residential housing in the area, nor has there been any for at least twenty (20) years. The replacement of the billboard signs is of the same size, composition and square area. The neighborhood as it is exists will not be affected by the movement of the signs. The use has not changed, nor has it been enlarged. The property borders a commercial zone. The sign shall take up no more space on the lot than previously.

The Appellate Court held that "where there is doubt as to whether an enlargement or change is substantial rather than insubstantial, the Court had consistently declared that it is to be resolved against the enlargement or change." However, the Appellate Court's interpretation leaves an open-ended invitation to municipalities to put an end to all noncon-

forming uses upon even the most minute change. The opinion seems to indicate that if the change or enlargement is questioned by the municipality then that and that alone give rise to the "doubt" as expressed in the standard set forth in *Parrillo*.

POINT II:

THE ORDINANCE UPON WHICH PLAINTIFF RELIES IS INVALID AS IT EXCEEDS THE AUTHORITY AS GRANTED BY N.J.S.A. 40:55D-68.

The ordinances of Eagleswood Township are set forth in the appendix of the Appellate Court Brief. More particularly, section 103-39b states, "that no nonconforming use shall be moved in whole or in part to any other portion of the lot or parcel occupied by such use at the effective date of the adoption of this chapter." This section does not take into account whether there can be inconsequential or unsubstantial movement or extension which does not warrant administrative interference and which can occur as a matter of right, even in a nonconforming use. However, the same is not considered in the Township Ordinance and as such exceeds the authority as granted by the section of the Municipal Land Act providing for continuation of nonconforming uses.

The Court's have not been reluctant to strike other ordinances which attempt to interfere with *N.J.S.A. 40:55D-68.* In *State v. Accera, 36 N.J. Super., 41 (App. Div. 1955),* a Borough of Eatontown Ordinance which held that any bulding or premise which was not actively engaged in a nonconforming use for a period of one (1) year, shall not be allowed to continue.

In *Spiegel v. Borough of Beach Haven, 116 N.J. Super., 148, (App. Div. 1971),* Beach Haven had an ordinance which established a percentage of damage beyond which a nonconforming construction may be replaced or reconstructed. In each of these instances, the Court found the ordinance to be invalid in that each matter is to be construed on a case by case basis and not by strict interpretation of ordinance. The question of whether the use or structure has

been lost depends upon the facts peculiar to that case and cannot be dealt with in generalities.

CONCLUSION

Wherefore the defendant prays, for the reasons set forth herein, that this Court grant certification.

Dated: August 22, 1983

LAWRENCE SILVER
Counsel for defendant-etitioner

I hereby certify that the foregoing petition presents a substantia qesion meritig cert-ification, and that it is filed in good faith and not for the purpose o delay.

Dated: August 22, 1983

LAWRENCE SILVER
Counsel for defendant-etitioner

NOT FOR PUBLICATION WITHOUT THE APPROVAL OF THE COMMITTEE ON OPINION

SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION
A-428-81T2

TOWNSHIP OF EAGLESWOOD,
Plaintiff-Respondent,
v.
WESLEY K. BELL,
Defendant-Appellant.

Argued June 7, 1983 Decided Jul 25, 1983

Before Judges Matthews, Antell and Francis.

On appeal from Superior Court, Chancery Division, Ocean County.

Lawrence Silver argued the cause for appellant Mr. Silver, on the brief).

George R. Gilmore argued the cause for respondent (Gilmore & Monahan, attorneys; Russell P. Cherkos, on the brief).

PER CURIAM

The municipal plaintiff proceeded in the Chancery Division for an injunctive order which required the defendant

Wesley K. Bell (Bell) to remove two commercial billboard signs erected on a premises within the Township. The order further provided that Bell could erect on the property a temporary political sign not to exceed 32 square feet in overall dimension. Bell appeals the prohibitive aspects of the injunctive order.

The two billboard signs are nonconforming uses contrary to a zoning ordinance passed in 1975. Had the signs remained in their same location it is conceded by the Township that it could not have sought their removal. Both of the billboards were, however, moved from their original locations to different ones on the premises upon which Bell had an easement.

One of the signs was moved as a result of a Chancery action in which it was determined that it was located on land not owned or leased by Bell. He was ordered in that action to remove the offending sign from the owner's property. At about the same time he moved the other sign from one location to another on the same premises.

The Chancery Division found that the relocation of the signs violated Article 6, Section 103-39B of the Eagleswood zoning ordinance, which states:

> No such nonconforming use shall be moved in whole or in part to any other portion of the lot or parcel occupied by such use at the effective date of the adoption of this chapter.

We agree with the trial judge that the relocation of the signs violated the above provision.

Bell argues that the particular provision is invalid. He contends that the relocation prohibition is an illegal attempt to limit or restrict valid nonconforming uses contrary to statutory authority. *N.J.S.A. 40:55D-68.* Specifically, Bell challenges as an impermissible restriction on nonconforming uses the particular subsection quoted above.

In *Belleville v. Parrillo's, Inc., 83 N.J. 309 (1980),* the Supreme Court noted that while the Municipal Land Use Act, *N.J.S.A. 40:55D-1 et seq.*, deems that nonconforming uses have "acquired a vested right to continue in such form, irrespective of...restrictive zoning provisions...[that] statutory guarantee against compulsory termination...is not without limit." *Id.* at 315. The *Belleville* court then noted several types of limitations that the courts of this State have allowed municipalities to impose on nonconforming uses. The limitations that have been allowed include: limits on change of use; the enlargement or extension of the repair or replacement of nonconforming structures, and limits on the duration of nonconforming uses through abandonment or discontinuance. *Ibid.* The *Belleville* court further noted that the method typically used to limit nonconforming uses was to prevent increase or change in the nonconformity. *Id.* at 316. The standard set out in *Belleville* for determining whether a particular nonconforming use would be allowed to continue where an increase or change in use was contemplated or undertaken was that: "...nonconforming uses may not be enlarged as of right except where the change is so negligible or insubstantial that it does not warrant judicial or administrative interference." *Ibid.*

Applying the *Belleville* standard, the inquiry here is whether the change made by Bell's relocation of the two signs was so negligible or insubstantial as to permit their existence as a valid nonconforming structure. There is no question that the change in location of the two billboards amounted to over 50 feet in one instance and over 100 feet in the other. We conclude that such a relocation is not so negligible or insubstantial a change as to permit their continuance on the premises.

Bell cites two Pennsylvania cases as authority for his contention that the mere relocation of the signs should not

invalidate their nonconforming status. In those cases the moves were found to be insubstantial or negligible. The substantial distance here from the original locations warranted administrative interference by the plaintiff municipality. In any event, "where there is doubt as to whether an enlargement or change is substantial rather than insubstantial, the courts have consistently declared that it is to be resolved against the enlargement or change." *Belleville*, 83 *N.J.* at 316.

The defendant also challenges Section 103-8H of the zoning ordinance as being unconstitutional as an impermissible infringement on the First Amendment right of freedom of speech. We doubt the standing of the defendant Bell to raise this issue. Bell was allowed by the municipality, and indeed it is reflected in the judge's order, to construct a temporary sign bearing a political message as long as it did not exceed 32 square feet in total sign area. It appears that Bell had begun the construction of such a sign on the property. This limitation on square footage was imposed since that is the largest dimensioned sign that is allowable by the section in the zoning ordinance which permits signs. Size limitations, absent an arbitrary determination, are allowable. *State v. Miller 83 N.J. 402, 416 (1980).* The limitation here is reasonable.

Affirmed.

LAWRENCE SILVER
WEST BAY AND ROUTE 9
POST OFFICE BOX 549
BARNEGAT, N.J. 08005
(609) 698-2050
ATTORNEY FOR defendant

Plaintiff
TOWNSHIP OF EAGLESWOOD,
v.
Defendant
WESLEY K. BELL,

SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION
APPEAL NO. A 00428-81-T02
Docket No. C 4054-80

CIVIL ACTION

NOTICE OF PETITION FOR CERTIFICATION

NOTICE is hereby given that the defendant Wesley K. Bell will petition the Supreme Court of New Jerseyu for Certification to the Appellate Division to review the final judgement of the Appellate Division entered in favor of the plaintiff in this action on July 25th, 1983.

The defendant further requests a stay of Civil Penalties, together with interest in the amount of $2,800.00.

The defendant is represented by Lawrence Silver, Esq.,

850 West Bay Avenue, P.O. Box 549, Barnegat, New Jersey, 08005, (609) 698-2050.

Dated: August 11th, 1983

LAWRENCE SILVER
Attorney for defendant

PROOF OF SERVICE

On August 12th, 1983 I, the undersigned, hand delivered to Clerk, Appellate Court, Trenton, New Jersey original and one copy of Notice; to Clerk, of the Supreme Court, Trenton, New Jersey, copy of said notice; to Gilmore and Monahan, P.A., attorneyus for the plaintiff, copy of said notice.

I certify that the foregoing statements made by me are true. I am aware that if any of the foregoing statements made by me are wilfully false, I am subject to punishment.

Dated: August 12th, 1983

EDWARD CURLEY

FILED MAY 21, 1981

Henry H. Wiley
Judge
Superior Court

HIERING, GILMORE & MONAHAN
NINE ALLEN STRET
P.O. BOX 1540 TOMS RIVER, NEW JERSEY 08753
(201) 240-6000
ATTORNEYS FOR Plaintiff

Plaintiff
TOWNSHIP OF EAGLESWOOD, a municipal corporation of the State of New Jersey,
vs.
Defendant
WESLEY K. BELL.

SUPERIOR COURT OF
NEW JERSEY
CHANCERY DIVISION
OCEAN COUNTY

Docket No. C 4054 80

Civil Action
VERIFIED COMPLAINT

Plaintiff, Township of Eagleswood, a municipal corporation of the State of New Jersey, having its principal office on Main Street, West Creek, New Jersey, by way of complaint against the defendant, says:

1. Plaintiff is a duly-incorporated municipal corporation

of the State of New Jersey.

2. In accordance with the provisions of N.J.S. 40:55D-1 et seq., the Township of Eagleswood adopted a zoning ordinance set forth in the Township Code Book as Chapter 103-1 et seq.

3. On or about April 2, 1981, the defendant made application to the Zoning Officer of the Township of Eagleswood, Herman O. Pharo, for a zoning permit to relocate three billboard signs. A copy of said application is attached hereto and made a part hereof as Exhibit A.

4. The application for a zoning permit by the defendant was denied by the Zoning Officer of the plaintiff, Township of Eagleswood, on the basis that the same was prohibited under Section 103-39 of the Township Code, a copy of which is attached hereto and made a part hereof as Exhibit B.

5. The property on which the defendant sought to relocate the billboard signs is zoned R-2, residential. Section 103-8(H) sets forth the signs which are permitted in the R-2 residential zone.

6. The billboard signs which the defendant sought to relocate are not permitted signs under the provisions of Section 103-8 (H). Although these signs were presently located in the R-2 zone, the same could not be relocated as relocation would be in violation of Section 103-39 (B) of the Township Code.

7. Notwithstanding the denial of the zoning permit, the defendant has relocated and erected two billboard signs and is in the process of relocating and erecting a third billboard sign, all in violation of the provisions of Section 103-39 (B) as the same are nonconforming uses under Section 103-8 (H). A letter dated April 9, 1981 was sent by the attorney for the Eagleswood Township Board of Adjustment to the defendant ordering him to desist from any further activity in relocating said signs. A copy of said letter is attached hereto

as Exhibit C. That letter was ignored.

WHEREFORE, plaintiff seeks judgement:

a. Requiring the defendant to immediately remove said billboard signs.

b. Restraining the defendant from taking any further action to relocate said billboard signs in violation of the provisions of the Township Code of the Township of Eagleswood.

c Compensatory and punitive damages against the defendant insofar as his actions were a willful disregard of Township ordinances and has resulted in expenditure of municipal funds.

d. That the defendant be permanently restrained from relocating any billboard signs which would be in violation of the Township Code.

e. For costs of suit.

HIERING, GILMORE & MONAHAN
Attorneys for Plaintiff

By
GEORGE R. GILMORE
For the Firm

Dated: May 21, 1981

AFFIDAVIT OF VERIFICATION

STATE OF NEW JERSEY) : SS.:

COUNTY OF OCEAN)

HERMAN O. PHARO, of full age, being duly sworn according to law, upon his oath, deposes and says:

1. I am the Zoning Officer of the Township of Eagleswood, the plaintiff in the within action.

2. I have read the complaint to which this Affidavit of Verification is attached and I find its contents to be true and factual to the best of my knowledge.

3. I am aware that if any of the foregoing statements made by me are wilfully false, I am subject to punishment.

HERMAN O. PHARO

Sworn to and subscribed before me
this 21st day of May, 1981.

GEORGE R. GILMORE
An attorney at law of the State of N.J.